

PROPERTY A

CONCEPT OF PROPERTY

Property describes the relationship and rights someone has to something. "It must be interpreted in the context in which it is used" *Yanner v Eaton*.

Cohen proposes to define property as "keep off X, unless you my permission, which I may grant or withhold." [signed by Private Citizen (endorsed by the State)]

- If something is your property; you have certain rights towards it
- More than one person can have property in an object (property bring the rights in relation to an object, not just the object) – involve prioritising different interests
- Property requires recognition by the State
- There needs to be some certainty as to what is property
- Value can be relative. There can also be worthless things such as paintings that are priceless.

Theories of property have been advanced in support of private property labelled as 'first occupation'. Theories are

- Locke's labour theory: you have put the time and effort into it, thus, you have ownership rights over it
- Utilitarianism: greater good for greater number. It is best for someone to own something so that they will look after it
- Economic efficiency: most efficient way to do it because you get the best use out of it, if you pay for it. The economic basis for private land ownership states that allocation of land should be made to the person who is likely to make most efficient use of the land.
- 'Personhood' theories: it is good for people to have private property – such as ownership of your own body.

CHARACTERISTICS OF PROPERTY

Ownership of an object includes right to

- Use
- Alienate – sell, transfer, gift (use the property how you want to)
- Exclude

This idea of ownership is rarely absolute in the true meaning of the word: subject to the rights of the others and/or the State.

Mabo v Queensland: possession and use of property by indigenous groups. Therefore, characteristics of property are culturally and historically specific.

Milirrpum v Nabalco Pty Ltd: the case decided that the doctrine of native title only applies to Aboriginal clans. Thus it needs to be established that predecessors had land before acquired by the Crown.

SUBJECTS AND OBJECTS OF PROPERTY

'Irrespective of political viewpoint, it is undeniable that the law of property embodies a broad range of value judgments. Value judgments reflect the body of cultural norms, the social ethic and also necessarily the political economy prevailing in any given community. It is inevitable that property law should thus serve as a vehicle for ideology, for 'property' has commonly been the [word] used to identify that which people most greatly value.'

SUBJECT OF PROPERTY

- Societies determine who can be 'subjects' of property. E.g. people, company, super (trust).

OBJECTS OF PROPERTY

- Society determine what can be an object of property.
- There is an in-exhaustive list of what constitutes as propriety interests in land. Interest must fall within these to be propriety.
- E.g. shares, songs, bonds but things like oil, rivers are not owned by anyone.

DIFFERENCE FROM CONTRACTUAL RIGHT

- Privity: you can only enforce rights to party in the contract. Propriety interest can be enforced upon others who do not sign the contract.
- Property and contractual rights has the scope of enforceability against third parties. Propriety right is the right of ownership (intellectual property) whereas contractual right are rights when parties enter into a contract. E.g. if property is sold the tenant cannot be kicked out
- Right to occupy land may be propriety or contractual
 - Occupation by the registered proprietor (fee simple: form of freehold ownership)
 - Occupation by a tenant (leasehold: is an ownership of a temporary right to hold land or property in which a lessee or a tenant holds rights of real property by some form of title from a lessor or landlord.
 - Occupation by a licensee (license: owner has allowed the licensee to enter the property)
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King v David Allen & Song Billposting

King was the fee simple owner of land, and entered into a licence (as licensor) with Allen (licensee) about posting of bills/adverts on walls around parts of the land. The agreement had a term of 4 years, and an annual rent. King agreed to allow advertising to be posted after building the theatre. Later, King entered into a lease with another company for the property which contained no mention of the agreement with DASB. The licence was never formally transferred thus it was King's responsibility.

Held: License is not propriety since it gives insufficient control over the land, thus cannot be enforced onto others. It cannot be enforced onto third party since it was contractual. A propriety interest is enforceable which could have been created with sufficient wording. Thus King breached in his contract.

RECOGNITION OF NEW FORMS OF PROPRIETY INTERESTS

All modern legal systems recognize a limited range of different types of property rights. There can be new objects/subjects of property but court is reluctant to do so. This is because introducing new ones can alter rights to certain property thus creates uncertainty.

1. Restrictive covenants

A **covenant** is a written condition on an agreement between the seller and purchaser of a piece of land restricting what the land can be used for. For example, restricting the type of building material the purchaser can use.

Tulk v Moxhay

Facts: Tulk owned undeveloped fee simple land in the middle of Leicester Square in London and surrounding houses. He sold the block of land to Elms who covenanted inter alia to retain the land in an open state so people around can use it as a garden. The land was acquired by Moxhay who knew about the covenant but was not expressly stated, argued that it was unenforceable against him.

Held: If contractual agreement → not enforceable and if propriety then enforceable. The Lord Chancellor held the grant of an injunction restraining Moxhay from developing the land. This is because he purchased it with the notice of the covenant the price paid reflected this restriction. The contract said it was implied that it would apply to anyone who owned the land.

2. Property in human body

Humans cannot be property, they cannot be owned by someone, at least since the abolition of slavery. There is debate over how much ownership people can have over their own body, in the sense of each of their body parts, and body products. Non-regenerative and regenerative have propriety interests like hair, nails, etc.

Bazley v Wesley Monash IVP Pty Ltd

Facts: where the applicant's husband arranged for collection and storage of his semen at the respondent IVF unit because he was suffering cancer and he wanted to have a baby. He signed that if he died they would not use it for fertility. The husband subsequently died without leaving any written directive about the semen. The respondent's policy requires a written directive in the event of death whether the semen extracted and stored can be characterised as property

Held: court held that sperm was human tissue and it rested upon the husband when he was alive and the widow when he died. They said that Monash was providing a service and as long as they continued to pay the fee there was a relationship maintained and that is till where there rights extended till (bailment). Sperm is different to other body parts.

Moore v Regents of the University of California

Facts: John Moore was treated for leukaemia by physician David Golde, a cancer researcher at the UCLA Medical Center. Moore's cancer cells were later developed into a cell line that was commercialized by Golde and UCLA.

Held: a hospital patient's discarded blood and tissue samples are not his personal property and that individuals do not have rights to a share in the profits earned from commercial products or research derived from their cells.

Panelli J: there was breach of fiduciary duty and failure to obtain informed consent. Moore did not expect to retain possession of his cells after removal. The lymphokines are not specific to Moore. Health and safety code limits control over excised cells.

3. Native title

Until 1922 there was terra nullius and rights of indigenous people were not recognized, this was until Mabo v Queensland. The High Court recognised nature of native title interest in land, concerned with the moral coherence of the basic principles – concern for coherence overrides precedents or accidents in history. Australian law cannot withstand immorality of proposition that no legal system existed prior to claim of sovereignty by the British Crown.

There is *Native Title Act* that sets out procedure to recognize native title.

'Personal theory' with the indigenous people since they have strong relationship with it. Utilitarianism and tragedy of the commons to protect the land.

NEW FORMS OF PROPERTY RECOGNIZED BY PARLIAMENT

For	Against
<ul style="list-style-type: none">• Social/technological advancement• Fairness and justice	<ul style="list-style-type: none">• Certainty• Difficulty of classification• Adverse consequences• Moral reasons (human body)

Example:

Intellectual property rights, rights in digital property: songs, movies, books, academic sources, trademarks, McDonalds (copyright act). Locke's Labour theory because they have put time and effort into these thus they should have ownership to this. Economic efficiency theory encourages them to create things by them having rights to this.

Property rights can help protect the environment (utilitarian theory) → give rights to carbon emissions etc.